185 (1)
Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Hussein Soloman Roble,

Petitioner,

v.

State of Minnesota,

Respondent.

On Petition for a Writ of Certiorari
to the State of Minnesota Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Frances v. Franklin, 471 U.S.307, 313-315, 105 S.Ct. The question presented is:

1. Does the "circumstances proved" standard of review adopted by the Minnesota Supreme Court violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America by limiting review such that the court no longer reviews all the record evidence when determining if the evidence supports conviction beyond a reasonable doubt?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of Minnesota Court of Appeals is unpublished and available in App A. Minnesota Supreme Court decision is available in App B. District Court transcript should be in App C.

JURISDICTION

The judgment of Minnesota court of appeals was entered on September 7, 2010. Petitioner timely filed a Minnesota Supreme Court petition for further review, which was denied on November 16, 2010 App.B. This Court's jurisdiction is invoked under 28 U.S.C. ☐1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America protects:

"The accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute thecrime with which he is charged". Francis v. Franklin. U.S.307.313-315. 105 S

STATEMENT

Procedural history: Petitioner was charged by complaint with committing Criminal Sexual Conduct in the Fifth Degree on June 28, 2009. Judge Daniel H. Mabley presided over the jury trial. Jury selection commenced October 14, 2009. (T.14) Petitioner moved for judgment of acquittal, which was denied October 14, 2009. (T.94) Petitioner was convicted October 14, 2009. (T. 160) Petitioner was sentenced November 2, 2009 and filed a Notice of Appeal November 5, 2009. September 7, 2010, Court of Appeals filed its Unpublished Opinion affirming Petitioner's conviction. Petitioner timely filed a Minnesota Supreme Court petition for further review, which was denied on November 16, 2010.

The facts: On June 28, 2009, the alleged victim, M.T., was in Kmart looking at specials on display next to the store entrance. (T. 33-34) She was next to the corner where the table was located. (T.34:9-17;35:5-24) MT also testified she was looking at shelves before she felt contact from behind. (T.49:2-7) MT did not know anyone was near her. (T.37:1-3) While looking at quilts, all of a sudden M.T. felt what she thought was someone's penis on her buttocks. (T.37:10-12) M.T was obviously clothed in K-Mart. M.T never saw Petitioner or anyone approach her. (T.37:13-19) She did not see petitioner make physical contact with her. (T.48:15-21) She never saw Petitioner until after there was no longer any contact. (T.48:22 to T.49:1) M.T based her belief that a penis touched her cloth-covered buttocks on how the contact felt. (T.39:3-6) She testified what she felt was "TOO BIG TO BE" a leg. (T.43:23 to T.54:1-6)

There is no testimony about the size of Petitioner's penis. M.T.'s testimony about what she felt varied: while she testified she was certain it was penis (T.39:3-6) when asked if she were sure, M.T. said, "I THINK SO." (T.54:1-6) When asked if what she felt could have been something other than a penis, M.T. testified "WHO KNOWS." (T.50:10-11)

M.T. testified she turned and confronted Petitioner who then ran "very fast" out of the store. (T.43:20-21) Surveillance recordings shown the jury showed Petitioner walking out of the store---not running. (T. 60:11-12; Exhibit 1) M.T testified Petitioner ran away from her and was trying to hide by going through different isles. (T.47:13-16) K-Mart loss-prevention officer Wichai Yang testified there is video monitoring throughout the entire store (T.56:7-8) but no recording shows Petitioner going through the isles with M.T. following him. The state played for the jury a video from camera which showed the entrance/exit of the store where petitioner is talking to a police officer. (T.62) No camera showing the alleged crime was played. At the end of the state's case, Petitioner moved for a judgment of acquittal, arguing that the state failed to prove beyond a reasonable doubt that Petitioner's penis touched M.T. The trail court denied the motion.

"T." refers to the transcript of the trial before Judge Daniel H. Mabley, Hennepin County District Court, on October 13-14, 2009.

Petitioner testified in his own defense. Petitioner is a long time United States resident who has lived in Minnesota since 1999. He has never been accused, charged, or convicted of any crime before and after. He is employed, after graduating in December of 2008 with a Bachelor's Degree from the University of Minnesota. Petitioner told the jury he was shopping at K-Mart in Minneapolis on June 29, 2009. Petitioner denied ever touching M.T. with his penis or intentionally touching her at all. (T. 104-106)

REASONS FOR GRANTING THE PETITION

The reason why the U.S Supreme Court should exercise its discretion to review the decision by the Minnesota Court of Appeals pursuant to rule 10, governing discretionary review, is:

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a Unites States court of appeals;

(c) a State court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

As explained below, each of the foregoing grounds support review.

I. Minnesota Court of Appeals has decided and adopted an important federal question in a way that conflicts with relevant decisions of this court.

Review by the United States Supreme Court is need to resolve the correct standard of review for cases involving circumstantial evidence. In State vs. Stein, 776 N.W.2d 709, (Minn., 2010) three justices of Minnesota Supreme Court held that "our task is to identify the "circumstances proved." Three justices concurred in the result but disagreed with limiting the standard of review to "circumstances proved" as justice Meyer wrote in an opinion concurring in the result:

> The plurality's formulation of the standard of review of convictions based on circumstantial evidence is far-reaching departure from our traditional rule, which calls for careful review of the rationality of the jury's inferences from the evidence and their sufficiency to overcome the presumption of innocence and establish guilt beyond a reasonable doubt. Furthermore, I agree with the opinion of Justice Paul H. Anderson, who concludes that the plurality's rule denies meaningful review. State v. Stein, 776 N.W.2d 709, 721 (Minn., 2010)

Since Stein was decided January 7, 2010, Minnesota appellate courts have cited Stein 16 times: twice by the Minnesota Supreme Court (State v. Al-Naseer, 2010 WL 3583014 and State v. Andersen, 784 N.W.2d 320) and fourteen times by various panels of the Minnesota Court of Appeals. See, State v. Nelson, 2010 WL 3119383, State v.

Grunig, 2010 WL 2035721; State v. Super, 781 N.W2d 390 (Minn Ct. App.2010); State v. Irons, 2010 WL 1541233; State v. Utech, 2010 WL 3744048; State v. Ronning, 2010 WL 3463500; State v. Koger, 2010 WL 2732044; State v Smith, 2010 WL 1850229; State v. Faga, 2010 WL 606572; State v. Klies, 2010 WL 346360. In seven of these cases, different panels of Minnesota Court of Appeals applied the "circumstances proved" standard of review, while in four cases Minnesota Court Appeals did not apply the "circumstances proved" standard of review but rather set forth some formulation of the standard of review that was reported prior to Stein. The "circumstances proved" approach calls for review by the United States Supreme Court for a number of reasons. The current standard of review is not settled: different panels of the Minnesota Court of Appeals have applied different standard of review. This has had state-wide impact as evidenced by the 16 cases already heard, and will recur until a majority of this court determines the proper standard of review.

II. Minnesota Supreme Court has adopted and decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

In Mosely v. Com., Not Reported in S.E.2d, 1999 WL 1134711, Va.app., December 07, 1999 (NO. 2477-98-3) the court ruled, "To satisfy the due process requirement of the Constitution, the prosecution must bear the burden of proving all elements of the offense beyond a reasonable doubt". (quoting United States v. Ballard,

423 F.2d 127, 133 (5th Cir.1970) When "a conviction is based on circumstantial evidence, 'all necessary circumstances proved must be consistent with guilt and inconsistent with innocence.

In state v. Crudup, Wash.App. 583, 524 P. 2d 479, Wash.App. Div.3, July 10, 1974 the court ruled, " In order to sustain a conviction on circumstantial evidence alone, the facts and circumstances relied upon must be consistent with each other, consistent with the guilt of the defendant and must be inconsistent with any reasonable hypothesis or theory of innocence which would establish, or tend to establish, the defendant's innocence."

In this federal case, U.S. v. McCrary, 1951 WL 1497, 1 C.M.R. 1, 1 USCMA 1, CMA, November 08, 1951 (NO.4) the court ruled, " ..... which is that there is no proof of criminal intent. The almost universal rule regarding circumstantial evidence, repeatedly affirmed by the courts, both federal and state, is, that there must be substantial evidence consistent with guilt and inconsistent with any reasonable hypothesis of innocence".

Another federal case Dimmick v. U.S., 135 F. 257, 70 C.C.A. 141, C.C.A.9 (Cal), Febraury 20, 1905 (NO. 1112) the court ruled, "To show that the court embodied therein the principle of law applicable to such cases: The law in regard to circumstantial evidence is this: In order to justify a jury in finding a verdict of guilt based entirely on circumstantial evidence, the circumstances

must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis of guilt asserted by the prosecution,....the facts necessary to the conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion.."

In U.S. v. Gordon, 253 F.2d 177, C.A.7 (Ill.), February 19, 1958 (NO.11929) the court ruled, " In order to justify a jury in finding a verdict of guilt based on a circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis of guilt asserted by the prosecution,....he could not give to the defendants a fair and impartial trail' and the distribution thereof deprived the defendant of Due Process of law."

In the above federal and state cases, Federal Court of Appeals and State Supreme Courts unanimously applied the correct standard of review for cases based on circumstantial evidence. That is to satisfy the due process requirement of the Constitution, which is that the prosecution must bear the burden of proving all elements of

the offense beyond a reasonable doubt and that the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence.

The "Circumstances Proved" Approach

The "circumstances proved" approach applied in this case and others by Minnesota Court of Appeals violates the due process Clause of the Fourteenth Amendment to the Constitution of the United States of America. "The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." France v. Franklin, 471 U.S. 307, 313-315, 105 S.Ct.1965, 1970-1971 (U.S., 1985) (citing In re Winship 397 U.S., at 364, 90 S.Ct., at 1073). The United States Supreme Court held that proof beyond a reasonable doubt is a "bedrock, 'axiomatic and elementary' [constitutional] principle." Id., at 363, 90S.Ct., at 1072. Proof beyond a reasonable doubt "protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in Winship, that 'it is far worse to convict an innocent man than to let a guilty man go free.' 397 U.S., at 372, 90 S.Ct., at 1077 (citing Speiser v. Randall, 357 U.S. 513, 525-526, 78 S.Ct.1332, 1341-1342, 2 L.Ed.2d 1460 (1958). Francis v. Franklin, 471 U.S. 307, 313-315, 105 S.Ct. 1965, 1970-1971 (U.S., 1985) Proof beyond a reasonable doubt is essential:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and

> confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a **1073 standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty. Let there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-1073 (U.S.NY. 1970) [Emphasis supplied] Contrary to the principles set forth above, the Court of Appeals review in the case at bar was limited by its "circumstances proved" approach (opinion, p. 3) thus diluting its scrutiny, which naturally would leave "people in doubt whether innocent men are being condemned" since reviewing court is not considering all of the record evidence, even though reviewing all the record evidence is essential when determining if the reasonable-doubt standard was met. "A "reasonable doubt" has often been described as one "based on reason which arises from the evidence or lack of evidence." Id.471 U.S. at 318, 105 S.Ct. at 1971, n.9 [emphasis supplied] (citing Jonhson v. Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 1624, 32 L.Ed.2d 152 (citing

cases)). Focusing on "circumstances proved," does not permit determination if "proof beyond a reasonable doubt" arose "from the evidence." The Supreme Court held "after Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a **reasonable doubt." Id. [Emphasis supplied] The "circumstances proved" standard of review does not consider "the record evidence" as a whole and therefore fails to provide the review necessary to ensure convictions are based on proof beyond a reasonable doubt. Moreover, because the "circumstances proved" standard of review does not examine all the record facts in evidence but only considers those facts the appellate court deem proven, the review necessary to ensure the jury rationally applied the standard to the facts in evidence is lacking:

> The winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence.

Jackson v. Virginia, 443 U.S. 307, 316-318, 99 S.Ct. 2781, 2787-2788 (U.S.,1979) [Emphasis supplied]. Without meaningful review, there is insufficient assurance the fact finder rationally applied the standard. "Under Winship, which established **318 proof beyond a reasonable doubt as an essential of Fourteenth Amendment Due Process, it

follows that when such conviction occurs in a state trail, it cannot constitutionally stand." Id. At 318, 2788. While "all of the evidence is to be considered in the light most favorable to the prosecution" [italics in original], "all of the evidence" must be considered "to guarantee the fundamental protection of due process of law." Id. At 318, 2789.

The lack of meaningful review caused by applying the "circumstances proved" approach violated Petitioner's due process rights. In practice, the Court of Appeals in Petitioner's case, and seven other panels of the Court of Appeals that applied the "circumstances proved" approach, put on blinders by removing from consideration all the record evidence, effectively placing it in a position similar to a reviewing court with inadequate factual findings. Precluding meaningful review violates due process. (See, e.g., Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326 (1967) (due process *requires* adequate findings for review); accord, State v. Christie, 494 N.W.2d 492 (Minn. Ct. App., 1993) Just as inadequate factual findings violate due process because that prevents meaningful review, intentionally disregarding evidence prevents a meaningful review of whether the record facts support a finding of proof beyond a reasonable doubt.

The United States Supreme Court's supervisory power is necessary in this case. Taking the evidence in the light most favorable to the State shows that any physical contact with M.T was limited to her clothed buttocks, which cannot support a conviction under Minn.Stat. § 609.3451, subd. 1(1), thus necessitating the exercise of the United

States Supreme Court's supervisory power to reverse the conviction of Petitioner of the offense charged.

The evidence does not prove sexual contact beyond a reasonable doubt. The only physical contact made with M.T. was over her clothed buttocks, which by statutory definition cannot constitute sexual contact. For purposes of this section,

> "sexual contact" ... does not include the intentional touching of the clothing covering the immediate area of the buttocks. Sexual contact also includes.... The nonconsensual touching by the complainant of the actors intimate parts, effected by the actor, if the action is performed with sexual or aggressive intent. Minn.Sat. □ 609.3451, subd.1.

The Court of Appeals' holding that petitioner effected sexual contact by touching his penis to M.T.'s buttocks is contrary to the statutory exclusion of "intentional touching of the clothing covering the immediate area of the buttocks." "The legislature intends the entire statute to be effective and certain." Minn.Stat. □ 645.17. The record evidence was consistent that M.T. was unaware of any contact until it occurred. Sexual contact was not effected by brushing against M.T.'s clothed buttocks. The conviction is therefore invalid and must be vacated.

The record facts reviewed as a whole do not support conviction. Assuming the jury believed M.T., she testified she was standing near the entrance of the store, when she felt contact with her clothed buttocks. It is unreasonable to

find Petitioner would brush his penis against a woman's buttock near the entrance of a busy store like K-Mart.

There is no foundation for M.T.'s belief she felt a penis. M.T. did not see a penis touch her. She did not observe any physical contact by petitioner. She did not describe the penis other than to say it was too large to be a leg, which reason proves is not a man's penis. There is no testimony as the layers of clothing worn but reason dictates there is at least four layers of clothing between M.T. and whoever brushed against her: M.T and the man wore underwear and pants. While M.T. testified she turned around and saw Petitioner after being brushed, the evidence established many people shopped at this K-Mart. (T.65:1-5; 13-15) Petitioner denied he brushed his penis against M.T. (T.106:17-19) He denied trying to hide from her. (T.121:2-3) The video recording not introduced in evidence would resolve the conflict in M.T.'s stories about whether Petitioner ran through aisles or walked out of the store like nothing happened.

There is insufficient record evidence to prove sexual intent beyond a reasonable doubt. Sexual intent requires the court to make a painstaking review of the record. State v. Buchanan, 431 N.W.2d 542. The court of Appeals' review was limited by its "circumstances proved" approach. Thus, it did not conduct a painstaking review of the record but reviewed the facts it assumed the jury found. The Court of Appeals' holding that sexual intent may be proven beyond a reasonable doubt based on feeling an erect penis brush the middle of M.T.'s buttocks is obviously based on conjecture.

Lastly, the trial court erroneously held that under Minn.Stat. □ 609.3541, subd. 1(1) merely brushing against someone is sufficient to support a conviction. (T.95:9-12) The Court of Appeals erred in affirming. To conclude merely brushing against someone is sufficient evidence of sexual intent when if one has an erection is unreasonable. Since "brushing" against someone is by definition very brief contact, not likely to fulfill sexual intent—let alone support a finding of sexual intent beyond a reasonable doubt "brushing" against someone is insufficient evidence to support Petitioner's conviction. The Court of Appeals should have reversed.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully submitted.

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March 28, 2011

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APPENDIX A

Decision of State of Minnesota Court of Appeals

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. [480A.08, subd.3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2013

State of Minnesota,
Respondent,

vs.

Hussein Soloman Roble,
Appellant.

Filed September 7, 2010
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CR-09-32332

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Brittany Lawonn, Certified Student Attorney, Minneapolis, Minnesota (for respondent)

Eric L. Newmark, Birrell & Newmark, Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by lansing, Presiding Judge; Wright, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

In this appeal from his conviction of fifth-degree criminal sexual conduct, appellant argues that the evidence is insufficient to sustain the jury's verdict. We affirm.

FACTS

Appellant Hussein Roble was charged with fifth-degree criminal sexual conduct, a violation of Minn. Stat. §609.3451, subd. 1(1) (2008), arising from an incident in a Minneapolis department store. The case proceeded to trial during which witnesses, including Roble and M.T., testified regarding the following events. In June 2009, M.T. was shopping at Kmart. According to M.T., while she was standing in an isle looking at sale items, she felt an erect penis touch her buttocks. She turned and saw a man, later apprehended and identified as Roble, and called for help. Roble began to run as M.T threw a package of sheets or curtains at him in an effort to make him stop. Before fleeing, Roble made a gesture to try to calm M.T.; and he said he was sorry. M.T chased Roble as he ran through the isles of the store and out of the entrance door.

When the offense was committed, Minneapolis Police Officer Jeffrey Carter was providing off duty security

services for Kmart. As he sat in his squad car parked outside the store's front entrance doors, he observed Roble exit the store and began to walk away. M.T., who followed Roble out of the store, ran to Officer Carter's squad car. According to Officer Carter, M.T. was shaking and crying. When Officer Carter asked what was wrong, M.T., who has limited English language proficiency, repeatedly pointed at Roble and said, "That man." Officer Carter approached Roble and asked him what happened. Roble told Officer Carter that he thought M.T. may be mentally ill because she yelled at him in the store and started throwing sheets at him. After Officer Carter placed Roble in the back of his squad car, he asked Y.B., a Kmart employee who speaks fluent Spanish and English, to translate for M.T. Through Y.B., M.T. told Officer Carter that Roble "brushed up against her buttocks with his penis." Officer Carter asked M.T. how she knew it was Roble's penis and whether it was "fully erect." M.T answered that it was fully erect and that she and Roble were the only people in an isle in which there was plenty of room for Roble to pass without touching her. After asking M.T. additional questions, Officer Carter arrested Roble.

Following its deliberations, the jury found Roble guilty of fith-degree criminal sexual conduct. This appeal followed.

DECISION

When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. State v. Chambers, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the conviction, assuming that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. Id. It is the exclusive province of the jury to determine the weight and credibility to be afforded the testimony of each witness. State v. Folkers, 581 N.W.2d 321, 327 (Minn. 1998). We will not disturb the guilty verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. State v. Alton, 432 N.W.2d 754, 756 (Minn. 1988).

Circumstantial evidence is entitled to the same weight as any other evidence, provided the circumstances proved are "consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." State v. Pirsig, 670 N.W.2d 610, 614 (Minn. App. 2003), review denied (Minn. Jan.20, 2004).

A person is guilty of fifth-degree criminal "if the person engages in nonconsensual sexual contact." Minn. Stat. [609.3451, subd. 1(1). Although "sexual contact" does not include the intentional touching of the clothing covering

the immediate area of the buttocks, "sexual contact" does include "the nonconsensual touching by the complainant of the actor's intimate parts, effected by the actor, if the action is performed with sexual or aggressive intent." Id., subd. 1 (2008). Here, Roble was charged with causing M.T. to touch his penis, which is an intimate part. See Minn. Stat. § 609.341, subd. 5 (2008) (defining "intimate parts" to include the "primary genital area" and "groin").

Roble first argues that there is only circumstantial evidence that he touched M.T.'s buttocks with his penis. Roble concedes that the evidence, viewed in the light most favorable to the verdict, is that Roble briefly brushed against M.T. Thus, Roble does not dispute that he was the person who touched M.T. Roble contends, however, that the state did not exclude all reasonable inferences other than guilt because "[i]t is reasonable to conclude that M.T. mistook another object, body part, cell phone, or something else as [Roble's] penis." We disagree. M.T Officer Carter and testified at trail that she Knew Roble touched her with his penis and that it was fully erect. As to this fact, M.T.'s testimony and her statements immediately after the offense are unequivocal. She is sure that Roble's penis touched her. It felt like an erect penis; it did not feel like a cell phone, leg, or finger. Based on the guilty verdict returned, the jury believed M.T.'s testimony and rejected Roble's testimony to the contrary. See Cjambers, 589 N.W.2d at 477 (requiring court reviewing a challenge to the sufficiency of the evidence to assume that jury believed the evidence supporting the guilty verdict and disbelieved evidence to the contrary); State v. Wallace, 558 N.W.2d 469, 472 (Minn. 1997) stating that it is the exclusive province of the jury to

determine the credibility and weight of the evidence). Moreover, there is no evidence in the record that Roble was carrying a cell phone or any other device that M.T. could have mistaken for his erect penis. When questioned by Officer Carter, Roble said that M.T. threw something at him without provocation. He did not suggest, as he does on appeal, that he may have brushed up against her in a such a manner she could have mistakenly thought he touched her with his penis. Indeed, Roble testified at trial that he did not recall bumping into M.T. When viewing the evidence in the light most favorable to the verdict, there is an abundance of evidence to support the jury's determination that Roble touched M.T. with his penis.

Roble next argues that, even if sexual contact occurred, the state failed to prove that the contact was made with the requisite intent. Because the intent element of an offense involves a state of mind, it is ordinarily proved circumstantially. State v. Davis, 656 N. W.2d 900, 905 (Minn. App. 2003), review denied (Minn. May 20, 2003); see also Davis v. State, 595 N.W.2d 520, 525-26 (Minn. 1999) (stating that intent may be proved by circumstantial evidence, including the defendant's conduct, and by events before and after the crime).

Roble first contends that he did not touch M.T with his penis. According to Roble, the evidence supports the conclusion that any contact was brief and that the contact took place in the isle of a department store where "a person could easily and unintentionally bump into another person." M.T. testified that Roble was the only person near her when she turned around immediately after being

touched. Roble did not tell Officer Carter or testify at trial that he accidentally bumped into M.T. The evidence, therefore, is inconsistent with Roble's contention on appeal that an accidental bumping occurred. M.T. also testified that Roble apologized and ran out the entrance doors of the store. Standing alone, the apology may support Roble's argument. But when combined with flight, the apology does not negate the evidence supporting the jury's determination that Roble's conduct was intentional. See State v. McDaniel, 777 N.W.2d 739, 747 (Minn. 2010) (stating that evidence of flight suggests consciousness of guilt). On this record, there is more than sufficient evidence to support the jury's conclusion that Roble acted with the purpose of causing physical contact between M.T. and his penis. See Minn. Stat. ¶ 609.02, subd. 9(4) (2008) (defining "[w]ith intent to" or "with intent that" as having a purpose to do thing).

Finally, Roble argues that the state failed to prove that he acted with either sexual or aggressive intent. M.T.'s testimony offers ample evidentiary support that Roble was sexually aroused when he touched M.T. with his penis and that the touching was sexual in nature. M.T. testified that Roble, a stranger, walked up behind her and touched her with his erect penis in the middle of her buttocks. The nature of this conduct permits the inference that Roble engaged in the contact with sexual intent. See Minn. Stat. §609.341, subd. 11 (a) (2008) (requiring "sexual or aggressive intent" (emphasis added00; State v. Ahmed, 782 N.W.2d 253, 262 (Minn. App. 2010) (rejecting appellant's contention that conviction may only lie where both sexual and aggressive intent are proven). Indeed, an erect penis is

probative of sexual intent. State v. Ohrtman, 466 N.W.2d 1, 3 (Minn. App. 1991) (stating that an erection, if proved, would be an indicator of sexual intent). When considered as a whole and viewed in the light most favorable to the jury's verdict, the evidence is more than sufficient to establish that Roble acted with sexual intent when he touched M.T.'s buttocks with his erect penis.

Our careful review of the record establishes that Roble has not presented a reasonable hypothesis supporting any conclusion other than that of guilt. There is more than sufficient evidence that, with sexual or aggressive intent, Roble intentionally touched M.T. with his erect penis in the middle of her buttocks. Accordingly, Roble's challenge to the sufficiency of the evidence to support his conviction of fifth-degree criminal sexual conduct fails.

Affirmed.

APPENDIX B

Decision of State of Minnesota Supreme Court

STATE OF MINNESOTA

IN SUPREME COURT

A09-2013

State of Minnesota,

Respondent,

vs.

Hussein Soloman Roble,

Petitioner.

ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that the petition of Hussein Soloman Roble for further review be denied, and the same is, denied.

Dated: November 16, 2010

BY THE COURT:

Lorie S Gildea
Chief Justice

APPENDIX C

(Please see)

Hennepin County District Court Transcript

Of The Trial Before Judge Daniel H. Mabley

On October 13-14, 2009

(2)

APPENDIX A

Decision of State of Minnesota Court of Appeals

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. §480A.08, subd.3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2013

State of Minnesota,
Respondent,

vs.

Hussein Soloman Roble,
Appellant.

Filed September 7, 2010
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CR-09-32332

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Brittany Lawonn, Certified Student Attorney, Minneapolis, Minnesota (for respondent)

Eric L. Newmark, Birrell & Newmark, Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by lansing, Presiding Judge; Wright, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

In this appeal from his conviction of fifth-degree criminal sexual conduct, appellant argues that the evidence is insufficient to sustain the jury's verdict. We affirm.

FACTS

Appellant Hussein Roble was charged with fifth-degree criminal sexual conduct, a violation of Minn. Stat. §609.3451, subd. 1(1) (2008), arising from an incident in a Minneapolis department store. The case proceeded to trial during which witnesses, including Roble and M.T., testified regarding the following events. In June 2009, M.T. was shopping at Kmart. According to M.T., while she was standing in an isle looking at sale items, she felt an erect penis touch her buttocks. She turned and saw a man, later apprehended and identified as Roble, and called for help. Roble began to run as M.T threw a package of sheets or curtains at him in an effort to make him stop. Before fleeing, Roble made a gesture to try to calm M.T.; and he said he was sorry. M.T chased Roble as he ran through the isles of the store and out of the entrance door.

When the offense was committed, Minneapolis Police Officer Jeffrey Carter was providing off duty security

services for Kmart. As he sat in his squad car parked outside the store's front entrance doors, he observed Roble exit the store and began to walk away. M.T., who followed Roble out of the store, ran to Officer Carter's squad car. According to Officer Carter, M.T. was shaking and crying. When Officer Carter asked what was wrong, M.T., who has limited English language proficiency, repeatedly pointed at Roble and said, "That man." Officer Carter approached Roble and asked him what happened. Roble told Officer Carter that he thought M.T. may be mentally ill because she yelled at him in the store and started throwing sheets at him. After Officer Carter placed Roble in the back of his squad car, he asked Y.B., a Kmart employee who speaks fluent Spanish and English, to translate for M.T. Through Y.B., M.T. told Officer Carter that Roble "brushed up against her buttocks with his penis." Officer Carter asked M.T. how she knew it was Roble's penis and whether it was "fully erect." M.T answered that it was fully erect and that she and Roble were the only people in an isle in which there was plenty of room for Roble to pass without touching her. After asking M.T. additional questions, Officer Carter arrested Roble.

Following its deliberations, the jury found Roble guilty of fith-degree criminal sexual conduct. This appeal followed.

DECISION

When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. State v. Chambers, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the conviction, assuming that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. Id. It is the exclusive province of the jury to determine the weight and credibility to be afforded the testimony of each witness. State v. Folkers, 581 N.W.2d 321, 327 (Minn. 1998). We will not disturb the guilty verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. State v. Alton, 432 N.W.2d 754, 756 (Minn. 1988).

Circumstantial evidence is entitled to the same weight as any other evidence, provided the circumstances proved are "consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." State v. Pirsig, 670 N.W.2d 610, 614 (Minn. App. 2003), review denied (Minn. Jan.20, 2004).

A person is guilty of fifth-degree criminal "if the person engages in nonconsensual sexual contact." Minn. Stat. §609.3451, subd. 1(1). Although "sexual contact" does not include the intentional touching of the clothing covering

the immediate area of the buttocks, "sexual contact" does include "the nonconsensual touching by the complainant of the actor's intimate parts, effected by the actor, if the action is performed with sexual or aggressive intent." Id., subd. 1 (2008). Here, Roble was charged with causing M.T. to touch his penis, which is an intimate part. See Minn. Stat. □ 609.341, subd. 5 (2008) (defining "intimate parts" to include the "primary genital area" and "groin").

Roble first argues that there is only circumstantial evidence that he touched M.T.'s buttocks with his penis. Roble concedes that the evidence, viewed in the light most favorable to the verdict, is that Roble briefly brushed against M.T. Thus, Roble does not dispute that he was the person who touched M.T. Roble contends, however, that the state did not exclude all reasonable inferences other than guilt because "[i]t is reasonable to conclude that M.T. mistook another object, body part, cell phone, or something else as [Roble's] penis." We disagree. M.T Officer Carter and testified at trail that she Knew Roble touched her with his penis and that it was fully erect. As to this fact, M.T.'s testimony and her statements immediately after the offense are unequivocal. She is sure that Roble's penis touched her. It felt like an erect penis; it did not feel like a cell phone, leg, or finger. Based on the guilty verdict returned, the jury believed M.T.'s testimony and rejected Roble's testimony to the contrary. See Cjambers, 589 N.W.2d at 477 (requiring court reviewing a challenge to the sufficiency of the evidence to assume that jury believed the evidence supporting the guilty verdict and disbelieved evidence to the contrary); State v. Wallace, 558 N.W.2d 469, 472 (Minn. 1997) stating that it is the exclusive province of the jury to

determine the credibility and weight of the evidence). Moreover, there is no evidence in the record that Roble was carrying a cell phone or any other device that M.T. could have mistaken for his erect penis. When questioned by Officer Carter, Roble said that M.T. threw something at him without provocation. He did not suggest, as he does on appeal, that he may have brushed up against her in a such a manner she could have mistakenly thought he touched her with his penis. Indeed, Roble testified at trial that he did not recall bumping into M.T. When viewing the evidence in the light most favorable to the verdict, there is an abundance of evidence to support the jury's determination that Roble touched M.T. with his penis.

Roble next argues that, even if sexual contact occurred, the state failed to prove that the contact was made with the requisite intent. Because the intent element of an offense involves a state of mind, it is ordinarily proved circumstantially. State v. Davis, 656 N. W.2d 900, 905 (Minn. App. 2003), review denied (Minn. May 20, 2003); see also Davis v. State, 595 N.W.2d 520, 525-26 (Minn. 1999) (stating that intent may be proved by circumstantial evidence, including the defendant's conduct, and by events before and after the crime).

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Finally, Roble argues that the state failed to prove that he acted with either sexual or aggressive intent. M.T.'s testimony offers ample evidentiary support that Roble was sexually aroused when he touched M.T. with his penis and that the touching was sexual in nature. M.T. testified that Roble, a stranger, walked up behind her and touched her with his erect penis in the middle of her buttocks. The nature of this conduct permits the inference that Roble engaged in the contact with sexual intent. See Minn. Stat. □609.341, subd. 11 (a) (2008) (requiring "sexual or aggressive intent" (emphasis added00; State v. Ahmed, 782 N.W.2d 253, 262 (Minn. App. 2010) (rejecting appellant's contention that conviction may only lie where both sexual and aggressive intent are proven). Indeed, an erect penis is

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Our careful review of the record establishes that Roble has not presented a reasonable hypothesis supporting any conclusion other than that of guilt. There is more than sufficient evidence that, with sexual or aggressive intent, Roble intentionally touched M.T. with his erect penis in the middle of her buttocks. Accordingly, Roble's challenge to the sufficiency of the evidence to support his conviction of fifth-degree criminal sexual conduct fails.

Affirmed.

APPENDIX B

Decision of State of Minnesota Supreme Court

STATE OF MINNESOTA

IN SUPREME COURT

A09-2013

State of Minnesota,

Respondent,

vs.

Hussein Soloman Roble,

Petitioner.

ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that the petition of Hussein Soloman Roble for further review be denied, and the same is, denied.

Dated: November 16, 2010

BY THE COURT:

Lorie S Gildea
Chief Justice

APPENDIX C

(Please see)

Hennepin County District Court Transcript

Of The Trial Before Judge Daniel H. Mabley

On October 13-14, 2009